(4)

No. 05-1643

IN THE

Supreme Court of the United States

JOHN P. HAMMER,
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF EUGENE,
a political subdivision of the State of Oregon,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Dolan v. City of Tigard*, 512 U.S. 374 (1987), create a prophylactic rule that requires governmental entities to make findings of "rough proportionality" at the time that they impose property exactions as a condition to development?

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Petitioner submits this Reply Brief to address new points raised in Respondent's Brief in Opposition. Sup. Ct. R. 15.6 (authorizing reply brief for that purpose). Respondent argues that this Court should deny the Petition for a Writ of Certiorari on the grounds that (1) this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to decide the issue presented, and (2) the petition does not present an issue that is ripe for review. Neither argument has merit.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(A)

Twenty-eight U.S.C. § 1257(a) limits this Court's authority to review decisions of state courts to only those cases in which the state's highest court has rendered "[f]inal judgments or decrees." In this case, no final judgment has issued because the state court judgment at issue remanded the case to the trial court for trial on the merits of petitioner's inverse condemnation claim.

The absence of a final judgment, however, does not mean that this Court is deprived of jurisdiction to consider the federal issue presented in this Petition for a Writ of Certiorari. That is so because the requirement of finality in 28 U.S.C. § 1257(a) is not absolute. Instead, this Court has interpreted 28 U.S.C. § 1257(a) to permit review of non-final judgments of a state's highest court in limited circumstances supporting a finding of finality on the federal question at issue. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975) (discussing same). In doing so, this Court has recognized "the mischief of economic waste and of delayed justice" which results from delayed review in cases where the anticipated additional state court proceedings involve no other federal questions which also might later require review by this Court. *Id.* at 478 (internal quotation marks and citations omitted).

Among the categories of cases in which this Court has allowed review of non-final state court decisions are those cases in which an important federal question might be mooted by the later state court proceedings. Specifically, this Court has described the posture of such cases as those in which:

> the party seeking review [with this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court,

> and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. Notwithstanding the lack of a final state court judgment, this Court has recognized that those circumstances warrant immediate review because a delay "might seriously erode federal policy[.]" *Id.* at 483.

This Petition for a Writ of Certiorari presents an important federal issue that might be mooted by the anticipated additional state court proceedings. At issue in this petition is whether the Takings Clause of the Fifth Amendment—as interpreted by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1987)—requires the government to make findings establishing the essential nexus and rough proportionality between an exaction and the alleged impact of a proposed development of private property *at the time* that the government imposes an exaction. That question will be mooted if Petitioner were to prevail on the merits of his underlying claim. In addition, a reversal of the state court ruling on that question will conclusively establish that the government's action in this case constituted a taking without just compensation in violation of the Fifth Amendment. This is true because it is uncontradicted that the City did not make *any* findings of rough proportionality in *any* of the approximately 173 minor partitions which were granted during the class period. Thus, this case satisfies both prongs of the test that this Court identified in *Cox* for this exception to apply.

If Petitioner were to prevail on his takings claim in the anticipated state court trial, then the federal question presented in this petition would be moot because Petitioner no longer would have grounds to challenge the timing of the government's essential nexus and rough proportionality deter-

minations. As described at length in Petitioner's Petition for a Writ of Certiorari and in the brief of *amicus curiae* Pacific Legal Foundation, the question whether governments may delay making such findings until an exaction is challenged is an important federal question that this Court has not yet addressed and that will have a substantial impact on the way that municipalities and other governmental entities process land use applications. Moreover, a determination that governments must make those findings at the time of the exaction will conclusively establish that an unlawful taking occurred in this case because it is undisputed that no such findings were ever made. No federal constitutional issues would remain because it is undisputed in this case that, if the exactions at issue constituted "takings," the City did not pay just compensation.

For those reasons, notwithstanding the lack of a final state court judgment, this Court has jurisdiction under 28 U.S.C. § 1257(a) to consider the federal issue squarely presented by this Petition for a Writ of Certiorari.

II. THE FEDERAL ISSUE IN THIS PETITION IS RIPE FOR THIS COURT'S REVIEW

In addition to challenging the basis of this Court's jurisdiction, Respondent also argues that the federal takings issue in this petition is not yet ripe for review. Specifically, notwithstanding the fact that the Oregon state courts did not perceive any ripeness obstacle, Respondents contend that Petitioner has failed to exhaust all available state law remedies. That contention is erroneous.

Respondent's ripeness argument is premised on the existence of an Oregon state constitutional prohibition against taking of private property without just compensation. According to Respondent, Petitioner has not exhausted all his state remedies because the state courts made no ruling on whether the governmental action violated the Oregon state

constitutional takings clause. Petitioner, however, presented both state and federal constitutional claims to the Oregon state courts. The fact that the Oregon state courts resolved the question by relying on federal constitutional law, rather than state constitutional law, does not mean that all state remedies were not exhausted.

CONCLUSION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to consider the federal issue in this Petition for a Writ of Certiorari because this petition presents an important federal question that might be mooted by the anticipated additional state court proceedings. The federal issue in this petition is also ripe for review because Petitioner has sufficiently exhausted all available state court remedies.

For the above reasons, and the reasons stated in Petitioner's petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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